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Office of Administrative Law Judges
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Date Issued: April 30, 1999

Case No: 1998-LHC-2298

OWCP No: 10-37195

In the Matter of

DONALD CARICH,

Claimant

v.

LAKE SUPERIOR WAREHOUSING,

Employer,

OHMS,

Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

James A. Sage, Esquire
1505 Alworth Building
Duluth, Minnesota 55802
For the claimant

Mark M. Suby, Esquire
3900 Northwoods Drive, Suite 250
St. Paul, Minnesota, 55112-6973
For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim for workers' compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, [hereinafter referred to as the Act]. The case was referred to the Office of Administrative Law Judges on June 23, 1998. (ALJX 1).

Following proper notice to all parties, a formal hearing was held on September 15, 1998, in Duluth, Minnesota. Exhibits of the parties were admitted in evidence at the hearing pursuant to 20 C.F.R. § 702.338, and the parties were afforded the opportunity to present testimonial evidence and to submit post-hearing briefs.

The findings of fact and conclusions of law set forth in this decision are based on my analysis of the entire record. Each exhibit and argument of the parties, although perhaps not mentioned specifically, has been carefully reviewed and thoughtfully considered. References to ALJX, CX, and EX pertain to the exhibits of the administrative law judge, claimant and employer, respectively. The transcript of the hearing is cited as Tr. and by page number.

ISSUES

The initial issue I must resolve is whether claimant's work-related accidents are covered under the Act. The remaining issues for resolution involve the nature and extent of claimant's disability resulting from his work-related injuries.[1]

FINDINGS OF FACT

Background

Employer, Lake Superior Warehousing (Lake Superior), operates the Public Marine Terminal at the Port of Duluth under a long-term agreement with the Port Authority. The facility is located on the waterfront, and includes several warehouses adjacent to the docks. On the other side of the warehouse facilities runs a railway line. Lake Superior began operating the facility in 1991. In order to make a profit, the employer operated the facility not only for the loading and unloading of ships, but also for warehousing shipments arriving by train and truck and then departing by either train or truck. (CX 5; Tr. 84-88).

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[1]Although counsel for the employer raised the issue of timeliness at the hearing, this issue was withdrawn in the employer's post-hearing brief.

The employer's agreement with the local union allows the company to classify the type of work done by its employees into two categories, longshore and warehouse. Employees are compensated for work performed within the longshore category at a higher rate of pay than for work performed within the warehouse classification. Each of the jobs are classified and given a job code to distinguish which type of job the employee is performing for payroll purposes. The employer also records the type of work performed for the purpose of paying the proper amount of insurance premiums, since different premiums are paid for the two different job classifications. Claimant's duties at Lake Superior primarily involved loading steel trucks and de-canning steel coils, but also involved heavy lifting and forklift operation, along with some maintenance work. (Tr. 22-23, 88-92, 106-108).

Donald Carich injured his back on October 6, 1995 and on January 24, 1996 while in the course of his employment with Lake Superior. The first injury occurred while claimant was lifting a towing chain and hook to put around a railroad car. At the time of the second injury, claimant was lifting bags of rock salt and using the salt to thaw ice on the railroad track. Mr. Carich filled out injury reports for each of the injuries and on both reports listed his classification at the time of the injury as "warehouseman." Claimant sought medical treatment from the Duluth Clinic after the second injury. He went through physical therapy and a work-hardening program at the Polinski Rehabilitation Center. (Tr. 23-27, 57-60; EX 3, 5, 6).

Mr. Carich continued to work while he was seeking treatment for his injuries, although he was unable to perform his full duties in the warehouse. Claimant visited his doctor in December 1996, with the complaint that he had been having a lot of problems with his back. The physician informed Mr. Carich that he would be unable to continue performing the type of work required by his job. He did not work because of his injury from December 5, 1996 to January 24, 1997. Mr. Carich then apparently took a leave of absence until February 24, 1997 because of a death in his family. (EX 7, p. 21). When he returned to work, he substituted for a foreman who was on vacation and was paid his regular wage rate. (EX 7, p. 21). The claimant was given a light duty job working in the employer's office in March of 1997. Claimant filed a state workers' compensation claim for the injuries involved in this claim. The parties reached a settlement in the state claim and signed an agreement on November 3, 1997. As part of the agreement, claimant quit his light duty job with Lake Superior on October 31, 1997. After settling the state claim, Mr. Carich filed this claim under the Longshore and Harbor Workers' Compensation Act. (Tr. 27-32, 97; EX 1, 4).

Medical Evidence

Claimant's medical records indicate he suffered a disc injury at the L4 disc which is eccentric towards the left side and appears to nudge against the L5 nerve root. The treatment records of Dr. Jed Downs indicate Mr. Carich had evidence of thoracic, cervical and lumbar sprains and that claimant had reached maximum medical improvement as of April 22, 1997. The physician reported claimant's disability as a 15% permanent partial disability. Dr. Down's records indicate Mr. Carich underwent physical therapy and visits to a chiropractor. The physician released claimant to return to work in a sedentary position on March 12, 1997. Claimant was released to work on April 22, 1997 with limitations as outlined in a functional evaluation. This evaluation lists Mr. Carich's capabilities and indicates these restrictions are in the medium work category. (CX 1, 4; EX 9).

The notes of Ann Myers, a physical therapist at the Duluth Clinic, indicate Mr. Carich was seen between December 12, 1996 and December 27, 1996 for treatment consisting of ultrasound, manual stretching and myofascial release and exercise provision. An initial evaluation from Center Therapy Work Hardening describes claimant's limitations and reports the results of a functional evaluation completed by the center. A discharge summary documents a program of stretching/strengthening exercises, aerobic activity, lifting drills, work hardening activities and body mechanics training prescribed for claimant between June 24, 1996 and July 17, 1996. Notes from chiropractic treatment received by claimant are also part of the record. (CX 2, 3).

Vocational Evidence

Wende Morrell, a nurse rehabilitation consultant registered with the state of Minnesota, worked with Mr. Carich from October 1996 until April 1997. Ms. Morrell's role was to work with claimant and the medical providers to make sure Mr. Carich received the appropriate care, to pre-authorize care and to assist in coordinating a return to work within claimant's physical capabilities. In providing services to Mr. Carich, Ms. Morrell took into consideration the doctors' recommendations regarding claimant's restrictions. She monitored claimant's return to work in the light duty position at Lake Superior for thirty days and determined the work activity was within his restrictions. Ms. Morrell testified at the hearing that sedentary to light positions were available at that time to Mr. Carich with compensation of approximately $7 to $9 an hour, but explained that not many jobs pay $9 an hour unless the individual has a lot of skills relating to the job. (EX 8; Tr. 40-54).

John Witzke, a certified rehabilitation counselor, testified at the hearing that he works with individuals who are injured on the job and helps with their return to suitable, gainful employment within the restrictions outlined by employers. His duties involve job searches, investigation of on-the-job training and job retraining. Mr. Witzke interviewed claimant on September 14, 1998, obtained a history and reviewed medical reports to determine what type of work would be appropriate for Mr. Carich. He determined claimant fit within the sedentary-to-light category of work restrictions. Mr. Witzske performed a labor market survey and determined there were jobs available to Mr. Carich. These positions included openings in cashier-type work, telephone operators, packing and shipping clerks, warehouse worker positions and a parts shipping clerk position. Based on physical status, age and education, he determined Mr. Carich's earning capacity was approximately $240 a week. He stated claimant would not be unable to earn $12 an hour on the open market, as he did in the light duty position with the employer. (Tr. 69-77).

Compensation

Lake Superior paid Mr. Carich temporary total disability compensation under the state workers' compensation program from December 5, 1996 through January 29, 1997 at the rate of $615.00 per week for a total of $4,920.00. For his light duty job with the employer, claimant was paid $12.00 an hour and received temporary partial disability payments to compensate him for the difference from his usual hourly wage. These payments totalled $9,751.04 from March 30, 1997 through November 9, 1997 at the rate of $304.72 per week. Employer also paid Mr. Carich permanent partial disability compensation under the state worker's compensation program based on a 14 percent impairment for 17.14 weeks at the rate of $612.50 per week or $10,500.00. Claimant also was paid the amount of $50,000.00 under the settlement of his state case for past, present and future claims. Altogether, he received disability compensation from the employer under the state workers' compensation program totalling $75,171.04, in addition to reasonable and necessary medical expenses. Mr. Carich's average weekly wage at the time of his injury was $753.34. (Tr. 6-7, 27-32, 97; EX 1, 4).

CONCLUSIONS OF LAW

Jurisdiction

Jurisdiction of the Act extends only to claimants who satisfy both the situs and status requirements of the Act. The situs requirement looks at the nature of the area. Section 3(a) of the Act provides:

> Compensation shall be payable under this chapter in respect of disability or death of

> an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. § 903(a).

The "adjoining area" language was added in 1972 and has been broadly interpreted to include land that is not contiguous to navigable water when certain conditions occur. In determining whether a facility is an "adjoining area" under the Act, courts have provided four factors which must be considered. The four factors include: 1) the suitability of the area for maritime purposes; 2) the use of adjoining areas; 3) proximity to the navigable waterway; and 4) whether or not the site is as close to the waterway as is feasible, given all of the circumstances. *Bradley-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141; 7 BRBS 409, 411 (9th Cir. 1978).

After consideration of these factors, I find the Lake Superior facility meets the situs requirement. It is immediately adjacent to the Duluth Harbor where ships may dock for unloading. The warehouse facility adjoins the dock and is designed for the storage of maritime commerce. The railroad tracks behind the warehouse are used for movement of goods to and from ships. The facility itself touches navigable waters and was designed for maritime commerce and the employer stated that its primary duty was to operate the port of Duluth.

Although the area meets the situs requirement, the claimant must also meet the status requirement in order for the Act's coverage to extend to his injuries. This inquiry focuses on the nature of the employee's duties. Section 2(3) of the Act defines the term "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations." 33 U.S.C. § 902(3). The United States Supreme Court describes this requirement as an occupational test rather than an inquiry into what duties claimant was performing at the time of the injury. *Northwest Marine Terminal v. Caputo*, 432 U.S. 249 (1977). A claimant need not be engaged in maritime employment at the time of the injury to be covered by the Act. *Id.* The Court found Congress did not intend for a claimant to walk in and out of coverage during a day's work, but intended to cover "persons whose employment was such that they spent at least some of their time in indisputably longshore operations." *Id.*

The Benefits Review Board (Board) followed this reasoning and held a determination must be made as to whether a claimant's overall employment was maritime in nature, regardless of whether the duties at the moment of injury are covered. *Brown v. Reynold's Shipyard,* 9 BRBS 614 (1979). Initially the Board relied on language in *Caputo* that workers were covered if they spent "at least some of their time" in covered activities and determined an employee satisfies the status requirement if he spends "a substantial amount of his employment in indisputably maritime activity." *Howard v. Rebel Well Serv.*, 11 BRBS 568 (1979), *rev'd* 632 F.2d 1348 (5th Cir. 1980). However, several circuit courts overruled the Board's "substantial portion" test and focused on the Supreme Court's language in *Caputo* that a worker who spends "at least some" of his time in maritime activities is covered by the Act. *Levins v. Benefits Review Board*, 724 F.2d 4 (1st Cir. 1984) *rev'g* 15 BRBS 281 (1983); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980), *rev'g* 11 BRBS 687 (1979), *cert. denied*, 452 U.S. 915 (1981); *see also Schwabenland v. Sanger Boats*, 683 F.2d 309 (9th Cir. 1982) *rev'g* 13 BRBS 22 (1980), *cert. denied*, 459 U.S. 1170 (1983) (regular performance of maritime operations sufficient to confer status).

Recent decisions by the Board have applied the "at least some part" standard. *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984); *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997); *Caldwell v, Universal Maritime Services Corp.*, 22 BRBS 398 (1989); *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58 (1997). The point at which the amount of covered employment is so minute that the employee will not be covered has not been determined. The determination is not a precise mathematical calculation, but instead, the key factor is the nature of the employee's regular assigned duties as a whole. *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey, supra*; *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998). Although an employee will be covered if some portion of his activities consists of covered longshore duties, those activities must be more than episodic, momentary or incidental to maritime work. Work is not considered episodic if it is a part of the employee's regular duties. *McGoey, supra; Lewis v. Benefits Review Board,* 724 F.2d 4, 16 BRBS (CRT) (1st Cir. 1984)*; Boudloche,* supra; *Kilburn,* supra.

The Board appears to be willing to grant coverage as long as some small part of an employee's regular duties involve clearly covered longshore activities. In two recent cases, the Board reversed decisions of administrative law judges who denied coverage based on determinations that the claimants were primarily employed as clerical workers, a job classification expressly excluded from coverage under Section 2(3)(A) of the Act. *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997); *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58 (1997). In both of these cases, the claimants were injured in falls from their chairs while performing clerical work. In *Riggio*, the claimant occa-

sionally worked as a checker, a covered activity. In *McGoey*, the claimant assisted in the unloading of a ship when his supervisor was absent and whenever a break bulk ship arrived. His supervisor had been absent once the previous year and the break bulk ship arrived twice. The Board found the administrative law judges in both cases erred in concluding claimants were not covered, even where their covered activities were a small percentage of their employment and where the injury occurred while they were performing acts clearly not covered under the Act. Thus, the Board will find coverage as long as a small, but regular part of the employee's duties involve covered activities.

In this claim, Mr. Carich clearly works both in activities covered under the Act and in non-covered warehouse activities. The employer separates these two types of activities and keeps records of the type of work performed. However, based on case law, as long as some regular part of an employee's overall employment involves covered activity, longshore coverage will extend to the employee while performing activities that would appear not to be covered under the Act. Thus, I am compelled by case law to find coverage under the Act in this case, even though such a result seems at odds with the original intention of Congress to give persons employed in maritime work an adequate remedy for injuries arising out of that employment. While Congress extended coverage in 1972 so that employees would not walk "in and out of coverage" the amendments were intended to provide uniform treatment of those engaged in longshore activities, whether on land or over water. In this case, the employer has two types of businesses, one maritime and the other non-maritime. The two types of duties are kept separate for payroll and insurance purposes. It is clear the employer intended the employees to be covered under the Act while performing longshore duties and under state worker's compensation while performing warehouse duties and paid insurance premiums to insure that the employees were adequately covered under both situations. However, since the same employees perform both functions, under prior decisions, they are covered under the Longshore Act for injuries arising out of both types of duties.

Nature and Extent of Disability

Donald Carich seeks permanent partial benefits from November 1, 1997 for injury to his back for the difference between his average weekly wage at the time of injury and the $240.00 per week he could earn in suitable alternative employment. *See* 33 U.S.C. § 908(c)(21). As noted above, the evidence establishes that claimant sustained injuries, as defined under the Act, to his back arising from his employment with Lake Superior. Therefore, the primary issue remaining for resolution is the nature and extent of any disability that is caused by his injuries.

Under the Act, "disability" is defined as the "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or other employment." 33 U.S.C. § 902(10). Generally, disability is addressed in terms of its extent, total or partial, and its nature, permanent or temporary. A claimant bears the burden of establishing both the nature and extent of his disability. *Eckley v. Fibrex and Shipping Co.*, 21 BRBS 120, 122 (1988); *Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 59 (1985).

Courts have devised two legal standards to determine whether a disability is permanent or temporary in nature. Under one standard, a disability is considered to be permanent where the underlying condition has reached the point of maximum medical improvement. *Trask*, 17 BRBS at 60. Under another standard, a permanent disability is one that "has continued for a lengthy period and . . . appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period." *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968). These two standards, while distinguishable, both define the permanency of a disability in terms of the potential for further recovery from the injury. The medical records of Dr. Downs indicate claimant reached maximum medical improvement on April 22, 1997. Thus, I find claimant suffers from a permanent disability as of that date. (CX 1).

The extent of disability is an economic concept. *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Quick v. Martin*, 397 F.2d 644, 648 (D.C. Cir. 1968). Thus, in order for a claimant to receive an award of compensation, the evidence must establish that the injury resulted in a loss of wage earning capacity. *See Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 776 F.2d 1225, 1229 (4th Cir. 1985); *Sproull v. Stevedoring Servs. Of America*, 25 BRBS 100, 110 (1991). A claimant establishes a *prima facie* case of total disability by showing that he cannot perform his usual work because of a work-related injury. Once a *prima facie* case is established, the claimant is presumed to be totally disabled, and the burden shifts to the employer to prove the availability of suitable alternate employment. *See Turner*, 661 F.2d at 1038; *Trans-State Dredging v. Benefits Review Bd. [Tarner]*, 731 F.2d 199, 200-02 (4th Cir. 1984); *Eliott v. C & P Telephone Co.*, 16 BRBS 89, 92 (1984). If the employer establishes the existence of such employment, the employee's disability is treated as partial rather than total. However, the claimant may rebut the employer's showing of suitable alternate employment, and thus retain entitlement to total disability benefits, by demonstrating that he diligently sought but was unable to obtain such employment. *See Palombo v. Director, OWCP*, 937 F.2d 70, 73 (2d Cir. 1991); *Director, OWCP v. Berkstresser*, 921 F.2d 305, 312 (D.C. Cir. 1991).

Claimant alleges that he is unable to return to his former employment due to a work-related injury. In the employer's post-hearing brief, counsel concedes that claimant is unable to return to his former employment. The medical evidence supports this concession as the functional evaluation and Dr. Down's reports indicate claimant is limited in his activities and can only perform work in a sedentary to medium work category. Thus, I find claimant has established he is unable to return to his pre-injury employment with Lake Superior.

The evidentiary burden now shifts to the employer to establish suitable alternative employment was available to Mr. Carich. An employer may satisfy this burden by showing the injured employee retains the capacity to earn wages in regular, continuous employment. *Meehan Seaway Service Co. v. Director, OWCP*, 125 F.3d 1163, 1170 (8th Cir. 1997); *DM & IR Railway Co. v. Director, OWCP*, 151 F.3d 1120 (8th Cir. 1998). Factors which must be considered in this inquiry include the claimant's age, background, employment history, experience, intellectual and physical capabilities, and the reasonable availability of jobs in the community for which the claimant is able to compete and could realistically and likely secure. *Id.* The presumption of total disability continues until this burden has been satisfied.

The employer alleges it had suitable employment available to claimant in the form of the light duty position claimant performed from February 1996 until he quit on October 31, 1996. One of the owners of the employer testified that this was a permanent position and would have been available to claimant until he was sixty-two and could retire. (Tr. 94-95). However, claimant argues this job was shelter employment and does not qualify under the Act as suitable alternative employment. An employer can meet its burden of establishing suitable alternative employment by offering the claimant a job in its facility as long as the position does not constitute sheltered employment. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224 (1986). Light duty work is not sheltered employment if the employee is capable of performing the work, it is necessary to the employer's operations, it is profitable to the employer, and several shifts perform the same work. *Peele v. Newport News Shipbuilding and Dry Dock Co.*, 20 BRBS 133 (1987); *Walker v. Sun Shipbuilding and Dry Dock Co.*, 19 BRBS 171 (1986).

One of the company's owners testified that the position was created for Mr. Carich with an understanding of what his job capabilities were. He explained that the company was willing to accommodate claimant in whatever way they could, including letting him lay on a couch in the office when necessary. The light-duty job was supposed to be available to claimant until his retirement. Mr. Nicholson also stated that claimant did not take over someone else's job and the position employer offered to claimant was not one that was open to other employees. (Tr. 94-

95, 104). However, claimant was required to resign from this position as part of the state workers' compensation settlement. Since the evidence shows the position was of uncertain duration and claimant left the position for reasons related to his injury, I find the clerical position does not establish suitable alternative employment under the Act. I note that even if the evidence had been sufficient to prove alternate employment, the evidence establishes claimant would be unable to earn similar wages in positions on the open market. Claimant's vocational expert testified that given Mr. Carich's age and abilities, claimant would be unable to earn $12 an hour paid by the employer in the light duty position in a similar job on the open market. (Tr. 75-76). An award of permanent partial disability must be based upon the employee's post-injury earning capacity. 33 U.S. C. § 908 (c)(21). Claimant's wage-earning capacity may be determined by his actual earnings in a post-injury position only if those earnings fairly and reasonably represent his wage-earning capacity. 33 U.S.C. § 908(h); *see also Mangaliman v. Lockheed Shipbuilding Co.*, 30 BRBS 39 (1996).

The employer presented the testimony of a nurse rehabilitation consultant. She stated there were positions available to Mr. Carich, but her testimony only involved available jobs in general. Since Mr. Carich returned to work with his former employer, she did not search for jobs on the open market within his restrictions at the time. Thus, her testimony is insufficient to establish suitable alternative employment.

Claimant's vocational expert performed a labor market survey and found specific positions of cashier, telephone operator, packing and shipping clerk, warehouse worker and a parts shipping clerk were available to Mr. Carich. He gave a rough approximate of claimant's earning capacity as $240 per week after consideration of all relevant factors. (Tr. 74-76). I find suitable alternative employment is established at the rate of $240 a week as of September 14, 1998, the date Mr. Witzke met with claimant and performed a survey of available jobs within claimant's restrictions.

Since suitable alternative employment has been established, claimant has shown he has a permanent partial disability and a resulting loss in earning capacity. Claimant's injury is covered under Section 8(c)(21), which provides for compensation in the amount of sixty-six and ⅔ percentage of the difference between the average weekly wage of the employee at the time of injury and his post-injury wage-earning capacity.

Compensation

At the hearing, counsel for both parties agreed claimant's weekly wage at the time of his injury was $753.34. (Tr. 6-7).

Thus, all compensation under the Act is to be computed based on that average weekly wage amount.

Mr. Carich is entitled to temporary total disability compensation under Section 8(b) of the Act from December 5, 1996 to January 29, 1997, the period of time he was off work due to his injury. It appears from the record that claimant took a leave of absence until February 24, 1997. He returned to work filling in for a foreman who was on vacation and was paid his regular wage. Since there is no loss of earnings during this period, no compensation is due. Claimant is also entitled to temporary partial disability under Section 8(e) for the period he was employed in a light duty position at a lower pay rate than his average weekly wage. This period runs from March 30, 1997 until April 22, 1997 when he reached maximum medical improvement. From the point of maximum medical improvement on April 22, 1997, until claimant resigned from his job on October 31, 1997 he is entitled to permanent partial disability under Section 8(c)(21).

Although I have found claimant is permanently partially disabled, claimant's disability is considered total from the time he left his employment until the date suitable alternate employment is established. *Polumbo v. Director, OWCP*, 937 F.2d 70, 25 BRBS 1 (CRT) (2nd Cir. 1991); *Stevens v. Director, OWCP,* 909 F.2d 1256, 23 BRBS 89 (CRT) (9th Cir. 1990), *rev'g Stevens v. Lockheed Shipbuilding Co.,* 22 BRBS 155 (1989), *cert. denied,* 498 U.S. 1073 (1991). Thus, claimant is entitled to permanent total disability under Section 8(a) of the Act from October 31, 1997 when he quit his job with the employer until suitable alternate employment was established on September 14, 1998. After this date, claimant is entitled to permanent partial disability under Section 8(c)(21) based on an earning capacity of $240 a week.

Credit for State Payments

The Act and state compensation statutes are designed so that amounts received for a work-related injury under one statute are credited against amounts received under the other. *Munguia v. Chevron U.S.A. Inc.*, 23 BRBS 180, 182 (1990). The Act specifically provides "any amounts paid to an employee for the same injury . . . for which benefits are claimed under this chapter pursuant to any other workers' compensation law . . . shall be credited against any liability imposed by this chapter." 33 U.S.C. § 903(e). In this case, the employer paid claimant several amounts under the Minnesota state workers' compensation statute. These amounts include: $4920 paid as temporary total disability; $9751.04 paid as temporary partial disability; $10,500 paid as permanent partial disability; and a lump sum settlement amount of $50,000. (ALJX 5, EX 4, 7, 8; Tr. 7-8). The amount of the credit is the actual dollar amount of the payment previously made to the claimant. *Brown v. Bethlehem Steel Corp*. 19 BRBS 200 (1987), *on recon.*, 20 BRBS 26 (1987),

aff'd in pertinent part and rev'd on other grounds sub nom. Director, OWCP v. Bethlehem Steel Corp., 868 F.2d 759, 22 BRBS 47 (CRT) (5th Cir. 1989). Thus, I find the employer is entitled to a credit in the amount of $75,171.04 against this award of compensation.

Attorney's Fee

Thirty days is allowed to claimant's counsel for the submission of an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. §§ 725.365 and 725.366. The application must be served on all parties, including the claimant, and proof of service must be filed with the application. The parties are allowed thirty days following service of the application to file objections to the application for an attorney's fee.

ORDER

Based on the above findings of fact and conclusions of law, IT IS HEREBY ORDERED that Donald Carich is entitled to the compensation listed below as a result of the claim involved in this proceeding. The specific computations of the award and interest shall be administratively performed by the District Director.

1. Lake Superior Warehousing shall pay to Donald Carich temporary total disability compensation under Section (b) of the Act from December 5, 1996 through January 29, 1997 at the rate of $502.23 per week, which is 66 ⅔ percent of the claimant's average weekly wage of $753.34;

2. Employer shall pay Mr. Carich temporary partial disability under Section 8(e) of the Act from March 30, 1997 until April 22, 1997 at the rate of 66 ⅔ of the difference between claimant's average weekly wage of $753.34 and the $480 a week as wages he was paid in the light duty position, or $182.23 per week;

3. Lake Superior Warehousing shall pay Donald Carich permanent partial disability under Section 8(c)(21) of the Act from April 22, 1997 through October 31, 1997 at the rate of 66 ⅔ of the difference between claimant's average weekly wage of $753.34 and the $480 a week he was paid in the light duty position, or $182.23 per week;

4. Employer shall pay to the claimant permanent total disability under Section 8(a) of the Act from October 31, 1997 through September 14, 1998 at the rate of $502.23 per week, which is 66 ⅔ of claimant's average weekly wage of $753.34; and,

5. Lake Superior Warehousing shall pay Donald Carich permanent partial disability under Section 8(c)(21) of the Act

from September 14, 1998 during the continuance of partial disability at the rate of $342.23 per week, which is 66⅔ of the difference between claimant's average weekly wage and his wage earning capacity of $240 a week.

Interest shall be paid on all accrued benefits in accordance with the rate applicable under 28 U.S.C. § 1961, computed from the date each payment was originally due until paid. The appropriate rate shall be determined as of the filing date of this decision with the district director. Credit also shall be given to Lake Superior Warehousing for payments made to Mr. Carich under the state workers' compensation statute.

IT IS FURTHER ORDERED that Lake Superior Warehousing shall pay any outstanding medical bills of Mr. Carich and shall continue to furnish reasonable, appropriate and necessary medical care and treatment for claimant's work-related injuries as required by Section 7 of the Act.

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DONALD W. MOSSER
Administrative Law Judge